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IN THE

Supreme Court of the United States

TAMIM SHANSAB,

Petitioner,

v.

TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR DISTRIBUTORS, INC., TOYOTA MOTOR CREDIT CORPORATION, and BARRY L. MOORE, Individually and in his capacity as General Manager, New York Region, of TOYOTA MOTOR DISTRIBUTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. Do the federal courts reject the decision of the Supreme Court of New Mexico in *Key, et al. v. Chrysler Motors Corporation*, 121 N.M. 764, 918 P.2d 350 (1996), *motion for rehearing denied*, in which it was stated that a disappointed applicant for a franchise, even in light of the holding in *Tynan*, could set forth a cause of action for tortious interference with prospective economic advantage by pleading a malicious motive?

2. In jurisdictions where there is a franchise protection statute and that statute does not explicitly create a cause of action for disappointed applicants for a franchise, is it proper for the federal courts to permit franchisors to maliciously interfere with the prospective economic advantage of applicants for a franchise?

3. In jurisdictions where there is a franchise protection statute and that statute does not explicitly create a cause of action for disappointed applicants for a franchise, can a disappointed applicant for a franchise state a cause of action for common-law tortious interference with prospective economic advantage, where the disappointed applicant pleads "malicious" intent on behalf of the franchisor?

4. In jurisdictions where there is a franchise protection statute and that statute does not explicitly create a cause of action for disappointed applicants for a franchise, do the federal courts give franchisors a blanket immunity from suit by the franchisees they reject, except in the cases of statutory discrimination and statutory antitrust?

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STATEMENT OF JURISDICTION

Petitioner Tamim Shansab respectfully submits that pursuant to 28 U.S.C. §1254 (1) jurisdiction exists for this Court to hear his petition for a *writ of certiorari*. On June 30, 2000, the United States Court of Appeals for the Third Circuit entered an Order of Judgment affirming the May 14, 1999 judgment of the United States District Court of the District of New Jersey against the disappointed Plaintiff-Appellant Tamim Shansab on his federal and state statutory discrimination. Shansab's appeal to the Third Circuit sought review of that May 14, 1999 judgment as well as the September 18, 1996 interlocutory dismissal of Shansab's common-law tortious interference claims. The petitioner seeks review of by this Court of that part of the June 30, 2000 Order of the Third Circuit which affirmed the dismissal of Shansab's common-law toritous interference claims.

STATEMENT OF THE CASE

The petitioner Tamim Shansab ("Shansab") respectfully comes before this Court seeking the grant of a *writ of certiorari*. On June 19, 1995, Shansab brought suit against Toyota Motors Sales USA, Inc., *et al.* ("Toyota") alleging that he, a Mercedes-Benz, Volkswagen, Audi and Porsche dealer in Toms River, New Jersey, was wrongfully rejected by Toyota in his attempt to acquire Gateway Toyota (also in Toms River) and, later, Hampton Toyota, in Newton, New Jersey.[1] As to Hampton, Shansab set forth that he was rejected first

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1 Acquiring an automobile dealership from an existing dealer has two components: purchasing the assets from the individual or entity that owns them and then seeking the approval of the franchisor to essentially consummate the transaction and transfer the franchise rights.

when he tried to purchase Hampton out of the Bankruptcy Court and later when he applied as an "open point" candidate after the Hampton dealership which was closed by Toyota for a period time. In a compelling fashion, Shansab's 45-page complaint alleged that Toyota, its agents, servants and employees, maliciously interfered with Shansab's attempt to acquire Gateway and Hampton. See 12a.

Shansab brought suit under 42 U.S.C. §1981 and the New Jersey Law Against Discrimination as well as common-law tortious interference. (2a). By Order and Opinion of September 18, 1996, the District Court dismissed the common-law tortious interference claims, opining that these claims were pre-empted by The New Jersey Franchise Practices Act (the "FPA"). (10a). The suit later proceeded to trial under just the discrimination claims. After a three-week jury trial, the jury rendered a verdict for Toyota, failing to attribute Shansab's rejections by Toyota to racial or ethnic discrimination. (8a-9a). Shansab appealed; (1) the jury verdict on certain evidentiary grounds and; (2) appealed the initial dismissal of his common-law claims. (6a-7a). Shansab petitions this Court to review the initial dismissal of his common-law claims. Common-law tortious interference claims are necessary to restrict unfettered, "malicious" behavior in the commercial setting. (12a). Any rule which purports to excuse such behavior as a matter of law deserves close scrutiny.

LEGAL ARGUMENT FOR ALLOWANCE OF PETITION

The Third Circuit's review of the September 18, 1996 (10a) dismissal of the common-law tortious interference claims was confined to one single paragraph of its opinion:

> Turning to the first issue, whether Shansab's tortious interference with prospective economic advantage claim was pre-empted by the FPA, we agree with the District Court that there is no tort remedy for the benefit of a prospective franchisee who is not protected by the FPA itself. *See Tynan v. General Motors Corp.*, 591 A. 2d. 1024 (N.J. Super. Ct. App. Div. 1991) *aff'd in relevant prt,* 606 A.2d 362 (1991), *rev'd on other grounds,* 604 A. 2d 99 (1992). This is so even when the plaintiff, as did Shansab, alleges malice. *Id.* at 1032. For that reason, we find no merit to the contention that the claim for tortious interference with prospective economic advantage was improperly dismissed.

See Appendix A. (3a). No cases other than *Tynan* were cited. This rule enunciated by the Third Circuit in this matter is squarely in conflict with the Supreme Court of New Mexico's opinion in *Key, et. al. v. Chrysler Motors Corporation,* 121 N.M. 764, 918 P.2d 350 (1996), *motion for rehearing denied.*

While *Tynan* cautions against *Judge-made liability* against franchisors, the result has been an even more troubling *Judge-made immunity* from any common-law causes of action for franchisors: immunity which was not intended and which has been rejected by Courts which have studied detailed fact scenarios similar to Shansab's.

By way of context, notwithstanding *Tynan*, it is not disputed that a disappointed applicant can sue a franchisor according to the statutory discrimination laws (evident from the fact that Shansab did in this case) and according to the

statutory antitrust laws. Discrimination laws and antitrust laws are both grounded in tort. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983) (Justice Marshall notes in dissent that "antitrust violations are essentially 'tortious acts.' " *Id.* at 547 (*citing Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946)); *see also generally, Mardell v. Harleysville Life Insurance Co.*, 31 F.3d 1221 (3rd Cir. 1994) (discrimination claim analogous to injury or tort claim). If the pronouncement of the Third Circuit in this case is correct — that all common-law suits are barred — a statutory antitrust plaintiff could not bring a "tortious interference" claim alongside of its statutory antitrust claim. In every other setting the two go hand in hand. Likewise — if all common law suits are barred — an antitrust plaintiff could not bring a claim for "common law restraint of trade." *See* Restatement of Torts §762A (common law restraint of trade). Again, in almost every other instance the two go hand in hand. Such a rule — the bar of all common-law suits — is not explicitly called for in *Tynan* and, it is respectfully submitted, given the above examples, runs contrary to notions of promoting fairness and prohibiting "malicious" behavior in the commercial setting. (12a).

The FPA was enacted, as it seems most franchise protection statutes were, for the protection of franchisees. The FPA and similar statutes were not enacted to protect franchisors or to limit the rights of third parties. In fact, the Third Circuit's pronouncement in this matter is in direct conflict with *Key* and goes well beyond the scope of the issues present in *Tynan*. True to the definition of intentional torts, discrimination theories, antitrust theories and tortious interference theories

of liability all focus on the "state of mind" and intent of the offending party as an essential element of the claim.[2] The *Key* decision recognized that distinction and the Court framed its discussion around "malicious" intent.

The rule pronounced by the Third Circuit in the *Shansab* matter approving of the dismissal of Shansab's common-law claims is unworkable, inconsistent and gives rise to a great deal of uncertainty in franchise law. An obvious problem will occur when a disappointed applicant (*i.e.* an applicant who is rejected by a franchisor) litigates a franchise denial case in the U.S. District Court for the District of New Mexico. If the disappointed applicant pleads "malicious" intent, the decision of the Supreme Court of New Mexico in *Key* will be at odds with the rule pronounced by the Third Circuit in this matter. Likewise, an obvious problem will occur when a disappointed applicant pleads a Sherman/Clayton antitrust claim alongside a common law restraint of trade claim in any District Court. The Third Circuit's rule in this matter would lead to an incorrect result and would compel dismissal of the common-law restraint of trade and tortious interference claims because the Third Circuit has concluded that no common-law claims exist.

Shansab respectfully submits that his common-law causes of action were undeservedly dismissed as a matter of law and that dismissal was incorrectly upheld on appeal. A more detailed analysis would reveal that Shansab, in fact, could and

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2 In the case of antitrust, it is the intent to fix prices or restrain trade, in discrimination it is the intent to discriminate and in the case of tortious interference, it is the malicious intent to interfere.

did state a cognizable cause of action. (12a). The instant case presents this Court with an ideal opportunity to harmonize the manner in which the Federal Circuits and Districts will deal with franchise denial cases. The argument for a writ in this case is compelling. There are no esoteric factual issues or discretionary decisions by the lower Courts complicating this petition, mitigating against the grant of a writ of certiorari. It is a pure issue of law. Shansab's tortious interference claims were dismissed, as a matter of law, at the Fed. R. Civ. P. 12(b)(6) stage. The question before this Court is simply whether or not the Federal Courts will permit a disappointed applicant to state a claim for tortious interference with prospective economic advantage when the disappointed applicant properly alleges "malice."

At present, the law governing franchise denial cases in the federal system is in disarray. The Courts are applying *Tynan* in instances where, as Shansab respectfully submits, the Courts should be following the more detailed thought process of *Key*. As a result the Courts are improvidently dismissing viable cases that should be allowed to proceed at least to the summary judgment stage, and, if appropriately meeting the burdens of Fed. R. Civ. P. 56, to a jury. The Court in *Key* simply clarifies that franchisors are subject to the same rules as any other parties engaging in commercial transactions — *Key* prohibits franchisors from acting maliciously. Shansab seeks review to create a consistent application of the law to all parties and all jurisdictions. Shansab's argument gives all due deference to the New Jersey Supreme Court's holding in *Tynan*. The facts of *Tynan* were limited, however, and it is clear that Tynan, the plaintiff, did not raise the issue of "malicious" conduct of the franchisor to the

Court, if there was any malicious conduct in the first place. The core of *Tynan* is that; 1) the FPA does not, itself, provide a cause of action to disappointed applicants and, 2) that the mere denial of an application does not give rise to a common-law cause of action. That second prong means that the mere denial of an application, without more, will not itself supply the requisite "malicious" intent to state a tortious interference claim. As both the District Court and the Third Circuit noted, however, Shansab alleged more than just the mere denial of an application, he alleged malicious conduct on behalf of Toyota. (3a,12a, 13a). For the District Court of New Jersey and the Third Circuit not to take into account the enormous difference that pleading "malice" creates, consistent with *Key*, demonstrates the disharmony.

The Federal Courts are likely to be faced with this situation time and time again. Since any franchise denial suits that contain Sherman/Clayton Antitrust claims must be brought in Federal Court, the Third Circuit's rule in this case clearly has a far-reaching effect. Likewise, suits by disappointed applicants are susceptible to removal on the basis of Federal question jurisdiction (because of discrimination claims) and removal on the basis of diversity jurisdiction (given the fact that there is one franchisor for tens, hundreds or thousands of franchisees). Therefore, this is an issue the Federal Courts are called upon to resolve as frequently, if not more frequently, that the state courts.

Just as common law antitrust claims may accompany statutory antitrust claims, Shansab should have been permitted to have common-law tortious interference claims alongside and in the alternative to his 42 U.S.C. §1981 discrimination claims.

The *Tynan* decision does not permit a franschisor to act with impunity toward an applicant for a franchise.

The Toyota defendants successfully argued in their motion to dismiss that Shansab's causes of action were barred by *Tynan*. As happens frequently in analysis of uniform commercial statutes (or nearly uniform commercial statutes), the *Tynan* case is relied upon by other jurisdictions in the interpretation of their respective franchise statutes or acts.

A diligent search of the national caselaw, state and federal, suggests a major distinction from the various plaintiffs' allegations in cases that rely upon *Tynan* or have *Tynan*-like allegations. None of these other decisions is based upon any more than the franchisor's discretion in the pure act of simply approving or not approving the candidate. *See Roberts v. General Motors Corporation,* 138 N.H. 532, 643 A.2d 956 (1994); *see also, Simmons v. General Motors Corporation,* 180 N.J. Super 522, 435 A.2d 1167 (1981) (predecessor decision of *Tynan*); *see also, Noller v. GMC Truck and Coach Division, General Motors Corporation,* 13 Kan. App. 2d. 13, 760 P.2d 688 (1988) *aff'd. in part, rev'd. in part,* 244 Kan. 612, 772 P.2d 271 (1989); *see also, General Motors Corporation v. Headquarters Dodge et al.*, 1992 U.S. Dist. LEXIS 18640 (D. N.J. 1992) (unpublished opinion); *see also, Fisher v. Gerald Jones, Olds-GMC-Buick, Inc., MBNA, et al.,* 306 Ark. 577, 816 S.W. 2d (1991). Simply put, when these Plaintiffs alleged "tortious interference," the actual "tortious interference" alleged was no more than the mere act of the franchisor interfering with the buy-sell agreement by not giving its approval to the prospective franchisee.

These decisions, some of them quite lengthy, do not contain any discussion of allegations of fraud, conspiracy or a venturing of the franchisor beyond its role in strictly stamping "approved" or "not approved" on the pending application. That is to say, none of the other decisions cited above discuss any conduct which would be similar to Shansab's allegations of Toyota's Barry Moore dealing in secret with the successful applicants, the DiFeo family and their company known as EMCO (the predecessor of United Auto Group) to the detriment of Shansab. (12a, 13a).

While the *Tynan* Court, as described by Judge Mary Little Parell (now Judge Mary Little Cooper) in her decision on Toyota's motion to dismiss, did not see fit to create Judge made Tort Law on behalf of disappointed applicants, it cannot be reasoned that *Tynan* insulates a franschisor from repercussions from all conduct, including "malicious" conduct, that it may engage in during the pendency of an application. It is common sense that a franchisor, in going beyond its inherent right to approve or disapprove an applicant, may create liability for itself, notwithstanding *Tynan*. As will be described below, other Courts have reached that conclusion.

The policy decision behind the legislature's failure to give prospective franchisees standing under the FPA and the various Courts' interpretation thereof is not usurped by the result that Shansab urges presently. *Tynan* will still protect the exercise of the franchisor's sound discretion. However, no franchisor can be permitted to, with impunity, maliciously interfere with an applicant's prospective economic advantage. (12a). Such conduct substantially and materially damages the disappointed applicant. Such conduct is neither

tolerated nor permitted anyhere else in the body of commercial law.

Reduced to its essence, the *Tynan* Court opined that the FPA does not create a new statutory duty *vis-à-vis* a franchisor and a prospective franchisee. However, in American jurisprudence, every actor has a duty not to act maliciously in a commercial context. That is a universal concept and franchisors should not be excepted from that standard.

Not even the Federal and State Governments enjoy the type of blanket immunity to which Toyota and other franchisors now lay claim. Franchisors, to their credit, have successfully cultivated a knee-jerk reaction that the FPA and similar statutes pre-empt every aspect of the common law and therefore, in the absence of authorization by the FPA, an applicant can never sue a franchisor under any circumstance and that franchisors may engage in tortious and malicious conduct against applicants with impunity. This rule by the Third Circuit badly distorts the meaning of *Tynan*. While the *Tynan* Court found that franchisors have no inherent duty to applicants by virtue of the FPA, the *Tynan* court did not rule that franchisors may act "maliciously" towards applicants as Shansab alleged that Toyota acted toward him. (12a, 13a).

Two cases do, in fact, open the dialogue as to holes in the cloak that frachisors claim insulate them from suits of every kind: (1) *Key et. al. v. Chrysler Motors Corporation,* 121 N.M. 764, 918 P.2d 350 (1996), *motion for rehearing denied,* and (2) *Trans-Oceanic Motors, Ltd. et al. v. Mercedes Benz of North America,* 1993 Conn. Super. LEXIS 305 (1993).

The first such case is *Key, et al. v. Chrysler Motors Corporation,* 121 N.M. 764, 918 P.2d 350 (1996), *motion for rehearing denied.* The Plaintiff in *Key* did not bring before the Supreme Court of New Mexico any factual allegations broader than those brought before the *Tynan* Court.[3] The

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3 As set forth in *Key, et al. v. Chrysler Motors Corporation,* 121 N.M. 764, 770, 918 P.2d 350, 356 (1996), *motion for rehearing denied:*

> In several other jurisdictions courts have denied standing to prospective purchasers of automobile franchises. *See Statewide Rent-A-Car, Inc. v. Subaru of Am.*, 704 F. Supp. 183, 184-85 (D. Mont. 1988); *Knauz,* 720 F. Supp. at 1328-31; *Beard Motors, Inc. v. Toyota Motor Distrib., Inc.*, 395 Mass. 428, 480 N.E.2d303, 305-07 (Mass. 1985); *Roberts v. General Motors Corp.*, 138 N.H. 532, 643 A.2d 956, 958-60 (N.H. 1994); *Tynan v. General Motors Corp.*, 248 N.J. Super. 654, 591 A.2d 1024, 1027-31 (N.J. Sup. Ct.), *certification denied,* 606 A.2d 362 (N.J. 1991), *modified on other grounds,* 604 A.2d 99 (1992) (per curiam). The Court of Appeals majority concluded that other states' statutes involve standing provisions containing more limiting language than New Mexico's, thus lessening the instructive value of these statutes and the cases interpreting them. *Key*, 119 N.M. at 272, 889 P.2d at 880. We agree. [*771] [**357] In Illinois, Massachusetts, Montana, and New Jersey, statutory provisions characterize the right of action as belonging to franchisees or motor vehicle dealers. See 815 Ill. Comp. Stat. 710/13 [***20] (Smith-Hurd 1994); Mass. Ann. Laws ch. 93B, § 12A (Law. Co-op. 1994); Mont. Code Ann. § 61-4-210 (1995); N.J. Stat. Ann. § 56:10-29 (West 1989). Thus,

in these states, the Legislature appears to have limited the cause of action to existing franchises.

The New Hampshire Supreme Court, construing a statute that granted a right of action to "any person so injured," denied standing on the ground that the plaintiff's injury was not within the Legislature's intent in drafting the statutes. *Roberts*, 643 A.2d at 960 (the claim based on the Dealership Act was properly dismissed for lack of standing). The court specifically noted that "the clear intent of the non-consumer-oriented provisions is to protect the investment and property interests of those who are already dealers." *Id.* at 959. On the other hand, comparable legislation in Florida grants a right of action to "any person." Fla. Stat. ch. 320.697 (1993). Additionally, the Florida Act specifically addresses the prospective franchisee of a franchise. See Fla. Stat. ch. 320.643 (1993). Accordingly, the federal court, interpreting the Florida statute, granted a prospective franchisee standing. See *Mike* [***21] *Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc.*, 32 F.3d 528, 531 (11th Cir. 1994), *cert. denied*, 1996 WL 625409. Similarly, in Pennsylvania the federal district court granted standing to the plaintiff based upon a statutory right conferred to "any person." 63 Pa. Cons. Stat. Ann. § 818.20 (Supp. Pamp. 1995); *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1382-83 (3rd Cir. 1992), *cert. denied*, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993).

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D. Key's Cause of Action

After considering the variety of statutory approaches [***26] implemented in other jurisdictions, we conclude that New Mexico's Act does not support a conclusion that the Legislature intended to allow prospective franchisees to recover damages for loss of a prospective franchise. Cf. N.J. Stat. Ann. § 56:10-29 ("A motor vehicle franchisee may bring an action against the motor vehicle franchisor which has granted its franchise, or any other person . . . to enjoin any violation of this act and to recover, where appropriate, any damages sustained by the franchisee as a result of a violation of this act."). Without more explicit textual support, we cannot conclude that the Act affords a right of relief to every person wishing to acquire an automobile dealership. See generally 1 Gladys Glickman, Franchising § 4.03[1] (1995) (*franchisors ordinarily are limited only by antidiscrimination and antitrust laws in selecting franchisees and rejecting potential franchisees*). *Such plaintiffs may seek relief under common-law remedies such as tortious interference with prospective or existing economic relationships*. See 4 Restatement (Second) of Torts § 766 (1979). In the tort of intentional interference with a prospective advantage, the [***27] basis for the imposition of liability requires proof of improper motive (intent to harm) or utilization of some improper means. *See M & M Rental Tools, Inc. v. Milchem,* [*773] [**359] *Inc.*, 94 N.M. 449, 454, 612 P.2d 241, 246 (Ct. App. 1980); *see also Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 159, 637 P.2d 837, 841 (1981) (adopting Restatement (Second) of Torts approach requiring improper motive or improper means in order to establish liability). *Thus, even in the absence of a right of action under the Act, a*

Plaintiff in *Key* did not allege "malicious" interference by the franchisor. The Supreme Court of New Mexico reasoned that if the Plaintiff could show that the Defendant had acted maliciously that, in fact, the Plaintiff would have had a common law cause of action — this even in light of *Tynan*. Since the Plaintiff did not have any such allegations, the Court was not called upon to decide what actions, in any, would still fall under the protections of *Tynan* and its companion decisions or what actions would specifically extend beyond its protection.

Causing further inquiry is that while the *Key* Court acknowledged that there could be more than meets the eye to a claim by a disappointed applicant, the Superior Court of Connecticut, in an unreported decision, had before it dispositive motions which caused it to look beyond the mere "approval" versus "denial" of an applicant. The Superior Court of Connecticut, in *Trans-Oceanic Motors et. al. v. Mercedes-Benz of North America, Inc.* denied Summary Judgment to the Defendant franchisor. Even though the Plaintiff did not have standing under the Connecticut version of the FPA to pursue Mercedes-Benz, the Court would not dismiss the Plaintiff's tortious interference counts:

> the defendant's argument ignores the fact that the plaintiffs allege that a verbal agreement exists in which the defendant allegedly agreed to act reasonably and in good faith when considering the

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> ***prospective purchaser may recover if he or she can prove the existence of a malicious motive.***

(Emphasis added)

> plaintiff's application. The facts surrounding the existence, terms and performance of this verbal agreement are material to the resolution of the tortious interference counts and are disputed. Therefore, there is a genuine issue of material facts as to counts nine and ten and the court hereby denies the defendant's motion for summary judgment as to these counts.

See Trans-Oceanic Motors, Ltd. et al. v. Mercedes Benz of North America, 1993 Conn. Super. LEXIS 305 (1993). Precedential value notwithstanding, this case provides excellent insight into how a Court should treat allegations similar to those of Shansab's.

Indeed, the *Trans-Oceanic Motors* case appears to be one of the few if not the only automobile franchise denial case which actually discusses specific acts of interference, misrepresentation or "malice" by the franchisor with the prospective applicant beyond the simple discretionary function of "approving" or "denying" the respective applicant. Indeed, this Connecticut Court insightfully gave weight to the duties which the franchisor may have voluntarily assumed through the representations it had made to the plaintiff and how acting maliciously may have contravened the duties that it and every other participant in the commercial markets have.

While Toyota argued that *Tynan* stands for the proposition that an exercise of the discretion of a franchisor is not actionable by a third party or proposed transferee, that conclusion does not speak to the allegations where Toyota took affirmative steps outside of the Toyota umbrella and acted

maliciously in concert with the DiFeos and First Fidelity Bank to prevent Shansab from being able to acquire Gateway Toyota and/or Hampton Toyota. (12a, 13a).

The Plaintiff in *Tynan* never alleged any such conduct and thus the Court could not have spoken as to that issue. *Tynan,* stands for the narrowly drawn proposition the Court will not create a common law remedy for an exercise of a franchisor's discretion in approving or disapproving of a candidate. The Court never had before it acts of the franchisor beyond that of the approving or disapproving the application of the proposed transferee. The *Tynan* Court held that it could "find no basis to authorize, as a matter of judge-made law, a tort remedy for the benefit of a prospective franchisee who is not protected by the Act itself." *See Tynan* at N.J. Super. at 672, A.2d at 1034. The phrase "judge-made law" implies that the Court would have to create a duty on behalf of the franchisor toward the prospective franchisee. In the absence of malicious intent by the franchisor, it would be true, but when the franchisor supplies its own malicious conduct, there is no need to debate whether or not a simple "denial" is an actionable wrong. (12a, 13a).

Therefore Shansab set forth a course of conduct by the Toyota Defendants that far exceeded anything contemplated or considered by the *Tynan* Court. Unlike *Tynan,* where the "stamping" of "approved" or "denied" on the plaintiff's application literally became the interference complained of, in the present matter, discovery revealed that the Toyota Defendants took affirmative steps with the DiFeos/EMCO and First Fidelity (the receiver of Gateway Toyota's assets) to Shansab's detriment during the pendency of Shansab's application. (12a, 13a).

The disagreement has left disappointed applicants who have suffered a wrong no remedy to redress this wrong. The dismissal of Shansab's common-law claims dramatically narrowed the scope of his litigation against Toyota. Statutory discrimination claims, for example, are not an adequate substitute for common-law claims which require "malicious" intent. The validity and existence of discrimination claims, antitrust claims (and, possibly, racketeering claims) by disappointed applicants against franchisors makes obvious the inconsistency in the current way franchise denial cases are viewed in the Federal Courts.

CONCLUSION

The petitioner Tamim Shansab respectfully submits that review by this Court is essential to remedy the inconsistent and disparate application by the Federal Courts of state franchise acts, an application which has incorrectly given franchisors almost complete immunity from suit by disappointed applicants for franchises. The Supreme Court of New Mexico has given the most thoughtful discussion of this subject and concluded that it is the allegations of the plaintiff's complaint that determines whether or not the plaintiff has a common law cause of action: the question is whether or not the disappointed applicant has alleged "malicious" acts by the franchisor. In this case, everyone agrees that Shansab did allege such acts. Shansab respectfully requests a writ of certiorari so that he may demonstrate to this Court the inconsistent and unfair application of the state franchise acts, which have been turned by the Federal Courts into statutes immunizing "malicious" conduct by franchisors against applicants. Shansab's common-law claims were improperly dismissed, as a matter of law, by the District Court and that dismissal was upheld because of the confusion as to the law at this time. This dismissal dramatically narrowed the scope of his litigation against Toyota, preventing him from being to redress "malicious" (but not necessarily racially discriminatory) conduct by Toyota. Shansab respectfully submits that the law regarding the role of common-law claims in franchise denial cases must be settled and that this case provides the perfect opportunity to do so.

September 28, 2000

Respectfully submitted,

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APPENDIX A – MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JANUARY 27, 2000

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5436

TAMIM SHANSAB,

Appellant

v.

TOYOTA MOTOR SALES USA, INC.; TOYOTA MOTOR DISTRIBUTORS TOYOTA MOTOR CREDIT CORP; BARRY L. MOORE, individually and his capacity as General Manger, New York Region of Toyota Motor Distributors, Inc.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-02983)
District Judge: Honorable Mary Little Cooper

Submitted Under Third Circuit LAR 34.1(a)
January 27, 2000

Before: GREENBERG, ROTH and STAPLETON, *Circuit Judges*

(Memorandum Opinion filed: June 30, 2000)

MEMORANDUM OPINION

ROTH, *Circuit Judge:*

Tamim Shansab brought suit against Toyota Motor Sales USA, Inc. (TMS), Toyota Motor Distributors, Inc. (TMD), Toyota Motor Credit Corp. (TMCC), and Barry L. Moore, alleging that the defendants had engaged in race, religion and national origin discrimination in denying Shansab's application to become a Toyota dealer. Shansab's claims were based on 42 U.S.C. §§ 1981 and 1982, N.J.S.A. 10:5-12(1) (NJLAD), the New Jersey Franchise Practices Act (FPA), and tortuous interference with prospective economic advantage. Shansab is a Moslem, male, United States citizen, born in Afghanistan.

On September 18, 1996, the District Court dismissed the FPA and tortuous interference claims on the grounds that Shansab, as a prospective, but rejected, transferee of two Toyota franchises, had no standing to assert the FPA claim and that the common law claim was preempted by the FPA. On June 23, 1998, the District Court granted summary judgment to TMCC and granted partial summary judgment to the remaining defendants. The following claims proceeded to trial: (1) the claim that TMS, TMD, and Moore discriminated against Shansab on the basis of race and/or national origin in connection with the denial of his application for approval as transferee of the Gateway Toyota dealership, in violation of § 1981 and NJLAD; and (2) the claim that TMS and TMD discriminated against Shansab on the basis of race and/or national origin in connection with the denial of his application for the new franchise in Newton, in violation of § 1981 and NJLAD.

The case was trifurcated and proceeded to trial on the liability phase in April-May 1999. The jury found in favor of the defendants. Shansab appealed both the dismissal of the

tortuous interference claim and the jury verdict. He contends that the FPA does not bar all tort claims by prospective franchisees and that the District Court erred in admitting evidence of Shansab's representation to a Mercedes-Benz franchiser about the source of funds he used to acquire a Mercedes-Benz franchise in 1991 and evidence of the subsequent bankruptcy of Shansab's own dealership, Coast. The evidence at issue was admitted only for limited purposes. Shansab never requested any limiting instructions on the use of this evidence and he never objected during the trial that the defendants had used it improperly.

The District Court had jurisdiction of this case under 28 U.S.C. §§ 1331, 1343(a)(4), and 1367. We have jurisdiction of the appeal under 28 U.S.C. § 1291. Our standard of review of the dismissal of a claim is plenary. Our standard of review of the admissibility of evidence is for abuse of discretion. However, to the extent that the District Court's evidentiary rulings turned on the interpretation of a legal standard or precept, our standard of review is plenary.

Turning to the first issue, whether Shansab's tortuous interference with prospective economic advantage claim was preempted by the FPA, we agree with the District Court that there is no tort remedy for the benefit of a prospective franchisee who is not protected by the FPA itself. *See Tynan v. General Motors Corp.*, 591 A.2d 1024, 1033 (N.J. Super. Ct. App. Div. 1991) *aff'd in relevant prt,* 606 A.2d 362 (1991), *rev'd on other grounds,* 604 A.2d 99 (1992). This is so even when the plaintiff, as did Shansab, alleges malice. *Id.* At 1032. For that reason, we find no merit to the contention that the claim for tortuous interference with prospective economic advantage was improperly dismissed.

The first evidentiary issue involves testimony concerning Shansab's dealings with a group of "Japanese Investors" at the time he became a Mercedes-Benz franchisee. This evidence had impeachment value because Shansab had made previous inconsistent statements that he had purchased the Mercedes dealership on his own and that he owned it 100%. The District Court limited the use of this evidence to impeachment of Shansab's credibility. To the extent that defendants may have exceeded that limitation in their questioning or argument, Shansab made no objection to this use. Nor did Shansab request a limiting instruction from the court on the purpose for which the jury could consider this evidence. Use of this type of inconsistent statement for impeachment purposes is proper. We conclude that the District Court did not abuse its discretion in admitting it.

Concerning the final issue, the admission of evidence of the bankruptcy of Shansab's Coast agency after he was turned down for the Toyota franchises, Shansab argues that this testimony was not admissible because it was evidence of post-decision performance and it had no probative value "at all" under F.R.E. 403. The District Court noted that the defendants were not relying on this evidence to prove their motivation in rejecting Shansab but to show that their financial assessment of Shansab as a businessman was in fact realistic. The court found this to be a proper use of this evidence and then offered to give any necessary limiting instructions.

In addition, at trial, Shansab made several references to the success of his Coast agency after his rejection by Toyota. In his opening statement, Shansab's attorney stated, "It's ongoing, it's dynamic and it's successful less than an eighth of a mile on the same side of the road, in Toms River . . . ." JA-

460. Shansab himself testified to the effect that sales rebounded strongly after 1993, JA-671, and that since 1992 all four brands of vehicles he sold "have double or tripled or quintripled their sales since then." JA-662. Evidence of the bankruptcy of this same agency was properly admissible to impeach Shansab's credibility.

Again, we do not find that the District Court abused its discretion in admitting evidence of Coast's bankruptcy.

For all the above reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

APPENDIX B – NOTICE OF APPEAL, DATED JUNE 11, 1999

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 95-2983 (MLC)

TAMIM SHANSAB

PLAINTIFF,

v.

TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR DISTRIBUTORS, INC., TOYOTA MOTOR CREDIT COPORATION AND BARRY L. MOORE, individually and in his capacity as General Manager, New York Region of Toyota Motor Distributors, Inc.,

DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that Tamim Shansab, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judg-

ment entered in this action on the 14th day of May, 1999, a copy of which is attached to this Notice of Appeal. Please take further notice that plaintiff further appeals from those interlocutory orders entered in the action prior to final judgment, including the Order of September 18, 1996 resolving defendants' motion to dismiss, the Order of June 23, 1998 resolving defendants' motion for summary judgment, and the Order of March 12, 1999 resolving certain *in limine* applications.

Respectfully submitted,

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Dated: June 11, 1999

APPENDIX C – JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, FILED MAY 14, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 95-2983 (MLC)

TAMIM SHANSAB

Plaintiff,

v.

TOYOTA MOTOR SALES USA, INC., TOYOTA DISTRIBUTOR, INC., AND BARRY L. MOORE,

Defendants.

JUDGMENT

xxxxx Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment as to liability upon jury verdict be entered in favor of defendants, Toyota Motor Sales USA, Inc., Toyota Distributors, Inc., and

Barry L. Moore and against plaintiff Tamin Shansab for no cause of action.

IT IS FURTHUR ORDERED that plaintiff's motion (134-1) to reinstate his expert Robert Favorito be and is hereby DENIED.

Dated: May 12, 1999

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

APPENDIX D – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY, FILED SEPTEMBER 18, 1996

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO: 95-2983 (MLP)

TAMIM SHANSAB,

Plaintiff,

v.

TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR DISTRIBUTORS, INC., TOYOTA MOTOR CREDIT CORPORATION, and BARRY L. MOORE,

Defendants.

MEMORANDUM AND ORDER

PARELL, District Judge

This matter is before the Court on (1) motion to dismiss Counts Seven, Eight, Nine, and Ten of the Complaint by defendants Toyota Motor Sales, U.S.A., Inc. ("TMS") and Toyota Motor Distributors, Inc. ("TMD"); and (2) motion to dismiss the Complaint or, in the alternative, for a more definite statement by defendant Toyota Motor

Credit Corporation ("TMCC").[1] Plaintiff Tamim Shansab ("Shansab") opposes the motions. For the following reasons, the Court dismisses Counts Seven, Eight, Nine, and Ten of the Complaint as to defendants TMS, TMD, and TMCC. The Court denies TMCC's motion to dismiss the Complaint in its entirety or for a more definite statement.

BACKGROUND

Plaintiff commenced this action on June 19, 1995, asserting claims under 42 U.S.C. §§ 1981 and 1982, the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, the New Jersey Franchise Practices Act (the "FPA" or the "Act"), N.J. Stat. Ann. 56:10-1 *et seq.*, and for tortuous interference with prospective economic advantage. Shansab alleges that defendants' decision to reject his purchase of two Toyota dealerships was "[m]otivated by animus towards Plaintiff's color, Middle Eastern and Afghani race and Middle Eastern and Afshanistani ancestry, his Moslem background in culture and religion, and the perception that he was an Arab." (Compl. ¶ 1.)

In March, 1993, Shansab was approached by Kenneth L. Hagen, Sr. ("Hagen"), the President and majority shareholder of Gateway Toyota, Inc. ("Gateway"), a franchised Toyota dealership in Toms River, New Jersey. (*Id.* ¶ 11.) Hagen offered to sell to plaintiff either a majority interest in Gateway or the assets thereof. (*Id.* ¶ 12.) On April 12, 1993, Shansab sent a franchise application to TMD. (*Id.* ¶ 17.) The

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1 TMCC also joins TMS and TMD in their motion to dismiss Counts Seven through Ten of the Complaint.

following day, Shansab wrote to TMCC to request that credit be extended to the dealership. (*Id.* ¶ 18.)

On May 3, 1993, Barry Moore ("Moore"), then the General Manger of the New York region for TMD, advised Hagen that his rights in Gateway and Hampton Toyota, another Toyota franchise owned by Hagen, would be terminated 60 days later. (*Id.* ¶ 31.) On the same day, Moore informed Hagen that the proposed transfer to Shansab was still under evaluation. (*Id.* ¶ 32.) Despite this communication, Shansab alleges that defendants[2] "had contacts with officials at First Fidelity Bank . . . [and] advised those officials that Toyota would not approve Shansab for the Gateway franchise, and otherwise discouraged First Fidelity Bank from working with, or taking seriously, Shansab's proposals concerning his acquisition of Gateway assets and the financing thereof." (*Id.* ¶ 36.) Plaintiff also alleges that Toyota encouraged Gateway's minority stockholder to obstruct the transaction between Shansab and Gateway. (*Id.* ¶ 37.)

On June 1, 1993, Moore wrote to Hagen to inform him that Toyota was rejecting Shansab as transferee. (*Id.*) Moore stated that plaintiff was "not qualified to operate the Gateway Toyota franchise because his automotive sales experience was in high cost, low volume sales while the Toyota dealership was high volume enterprise." (*Id.* ¶ 39.) Shansab claims that this stated reason was pretextual and that Moore

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2 Throughout the Complaint, plaintiff refers to TMS, TMD, and TMCC as "Toyota" or the "Toyota Defendants." It is not always clear, therefore, to which of the named defendants Shansab is referring.

told plaintiff's attorney that "the real reason for the rejection was Shansab's plan to have an ongoing relationship with Hagen as general manager of the dealership." (*Id.* ¶ 40.)

On June 9, 1993, plaintiff sent an amended application to Toyota. (*Id.* ¶ 41.) This application reflected no relationship with Hagen and identified another individual as the general manager. (*Id.*) On June 17, 1993, Moore informed Hagen that Toyota had again rejected Shansab as transferee. (*Id.* ¶ 43.) Later that summer, Gateway was transferred to EMCO Holdings, Inc. ("EMCO"). (*Id.* ¶ 45.) Plaintiff claims that Toyota's rejection of him as transferee was "impermissibly based on invidious racial discrimination and discrimination based on creed." (*Id.* ¶ 46.) Shansab finds support for this conclusion in the fact that none of the principals of EMCO "is a member of the Middle Eastern or Afghani race and is not Moslem by background." (*Id.*)

Hagen also owned Hampton Toyota ("Hampton"), a franchised Toyota dealership in Newton, New Jersey. (*Id.* ¶ 47.) On June 9, 1993, Shansab sent a franchise application for Hampton to Toyota. (*Id.* ¶ 48.) According to plaintiff, Hampton had filed for Chapter 11 protection before receiving plaintiff's application. (*Id.*) On August 15, 1994, Toyota informed plaintiff that another candidate had been selected as transferee of the Hampton franchise. (*Id.* ¶ 56.) Shansab claims that Toyota failed to advise Hagen within 60 days that the proposed transfer was unacceptable, thereby violating the FPA. (*Id.* ¶ 57.) Plaintiff avers that "[s]ubsequently, the Hampton franchise was awarded to parties other than Shansab. None of the principals of the new franschisee are members of the Middle Eastern or Afghani race, of Moslem

background, of Middle Eastern or Afghanistani ancestry, nor did they appear to be Arabs." (*Id.* ¶ 58.)

Plaintiff alleges that because he has been "wrongly denied the opportunity to take over the Gateway and Hampton franchises, he has lost the prospective business advantage and profit which he would otherwise have gained from these going concerns and the successor dealerships Shansab would have operated." (*Id.* ¶ 59.) Shansab asserts claims under 42 U.S.C. §§ 1981 and 1982, (*Id.*, Counts One through Four, ¶¶ 63-83), the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, (*Id.*, Counts Five and Six, ¶¶ 84-92), the FPA, (*Id.*, Counts Seven and Eight, ¶¶ 93-108) and tortuous interference with prospective economic advantage, (*Id* Counts 95, 10, ¶¶109-125.)

DISCUSSION

I. MOTION TO DISMISS STANDARD

A court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) "only if, accepting all alleged facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986) (citation omitted). Additionally, all reasonable inferences that can be drawn from the plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987) (citations omitted). A court may not dismiss a complaint unless the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer

evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

II. MOTION TO DISMISS COUNTS SEVEN, EIGHT, NINE, AND TEN OF THE COMPLAINT BY DEFENDANTS TMS, TMD, AND TMCC

Defendants TMS, TMD, and TMCC move to dismiss with prospective economic advantage. Relying on *Tynan v. General Motors Corp.*, 591 A.2d 1024 (N.J. Super. Ct. App. Div.), *certif. denied*, 606 A.2d 362 (N.J. 1991), *rev'd as to Part VI*,[3] 604 A.2d 99 (N.J. 1992), defendants argue that plaintiff, a would-be purchaser of a franchise, has no standing to sue under the FPA. (Defs.' Br. At 5.) Thus, defendants contend, the reason Toyota rejected Shansab as transferee is irrelevant. (*Id.* at 7.) Defendants argue that even if Shansab's application were "deemed granted" by Toyota's failure to act on the application within the required 60 days, Shansab never became a franchisee within the meaning of the FPA. (*Id.* ¶ 9-11.) Finally, defendants maintain that because plaintiff does not have standing to sue under the FPA, he may not assert a claim for tortuous interference with prospective economic advantage based on an alleged violation of the Act. (*Id.* At 12.)

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3 Part VI of the *Tynan* decision concerned a warranty parts reimbursement claim. *See Tynan*, 591 A.2d at 1034-35. Therefore, the fact that the New Jersey Supreme Court reversed this portion of the Appellate Division's opinion has no bearing on this case or the issue of a prospective transferee's standing under the FPA.

In opposition to defendants' motion to dismiss Counts Seven through Ten of the Complaint, plaintiff argues that he was "deemed to have been offered the Gateway franchise" through defendants' actions. (Pl.'s Opp'n Br. At 20.) Shansab asserts that under New Jersey law, a franchisor's decision to disapprove a transfer must be reasonable. (*Id.* at 24.) Additionally, plaintiff contends that standing under the FPA is irrelevant to standing to bring a common law interference claim. (*Id.* at 14.)

The FPA defines a "franchisee" as "a person to whom a franchise is offered or granted." N.J. Stat. Ann. 56:10-3(d). The Act sets forth the procedure by which a franchise may be transferred:

> It shall be a violation of this act for any franchisee to transfer, assign or sell a franchise or interest therein to another person unless the franchisee shall first notify the franchiser of such intention by written notice setting forth in the notice of intention by written notice setting forth in the notice of intent the prospective transferee's name, address, statement of financial qualification and business experience during the previous 5 years. The franchiser shall within 60 days after receipt of such notice either approve in writing to the franchisee such sale to proposed transferee or by written notice advise the franchisee of the unacceptability of the proposed transferee setting forth material reasons relating to the character, financial ability or business experience of the proposed transferee. If the franchiser does not reply within the specified 60 days, his approval is deemed granted. No such

> transfer, assignment or sale hereunder shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect.

N.J. Stat. Ann. 56:10-6.

In *Tynan*, 591 A.2d at 1025, the Appellate Division considered whether "a contract purchaser of an existing automobile franchise is a 'franchisee' entitled to the protection of the New Jersey Franchise Practices Act." The facts of *Tynan* are strikingly similar to the facts of the case at bar. The plaintiff in *Tynan* sought to purchase a General Motors ("GM") franchise. *Id.* GM refused the transfer proposal offered by Tynan, and the existing franchisee subsequently sold the franchise to a third party who was accepted by GM. *Id.* at 1026, 1027.

The *Tynan* court noted that New Jersey courts have "declined to treat a prospective or actual transferee of a franchise as a 'franchisee' before the 'franchiser' approves the transfer." *Id.* at 1029 (citing *Simmons v. General Motors Corp.*, 435 A.2d 1167 (N.J. Super. Ct. App. Div.), *certif. denied*, 443 A.2d 712 (N.J. 1981)).[4] The court of other states have also determined that the contract purchaser of a franchise does not have standing to assert the rights of a franchi-

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4 In *Simmons*, the Appellate Division saw "no duty owed by GM to" the proposed transferee. *Simmons*, 435 A.2d at 1178. Rather, the "duty to give 'material reasons' for the rejection of a transferee is owed to the franchisee." *Id.* (Citing N.J. Stat. Ann. 56:10-6).

see.[5] The Appellate Division concluded that the New Jersey Legislature, "like those of other states, did not intend the Act to protect a prospective transferee and, thus, that a contract

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5 The Appellate Division cited the Massachusetts Supreme Court's holding that " 'a prospective purchaser of a motor vehicle dealership does not have standing under [the statute] to bring an action against a motor vehicle distributor who unreasonably withholds consent to the transfer of the prospective seller's franchise in violation of [the act].' " *Tynan*, 591 A.2d at 1029 (alterations in original) (citing *Beard Motors, Inc. v. Toyota Motor Distribs., Inc.*, 480 N.E.2d 303, 304 (Mass. 1985)). The Massachusetts court reasoned:

> [The act] was a response to long-recognized problems including that of the coercion of dealers by automobile manufacturers through such means as the cutting off or purposeful manipulation of the supply of cars . . . . [T]he intention of the Legislature was to protect motor vehicle franchisees and dealers from the type of injury to which they had been susceptible by virtue of the inequality of their bargaining power and that of their affiliated manufacturers and distributors. The injuries alleged by [plaintiff] – primarily the loss of anticipated profits from the sale of Toyotas and from capital appreciation in the value of the Toyota dealership, due to its inability to obtain the Toyota franchise – are not injuries within the area of legislative concern that resulted in the enactment of [the act]. [Plaintiff,] therefore, does not have standing under [the act.]

Id. at 1029-30 (alterations in original) (quoting *Beard Motors*, 480 N.E.2d at 306-07).

purchaser is not a 'franchisee' with standing to bring an action under the Act." *Id.* at 1031 (footnote omitted).

The plaintiff in *Tynan,* like plaintiff here, also asserted a common-law claim for tortuous interference. The Appellate Division recognized that the FPA "does not expressly provide that all common law actions stemming from the improper withholding of consent to transfer are subsumed within or preempted by the Act." *Id.* at 1033. Nonetheless, the court rejected Tynan's contention that the common law claim of tortuous interference with prospective economic advantage survived the FPA. *Id.* The court reasoned:

> General Motors has rights under both its franchise agreement and the Act. By exercising its own rights, GM cannot be said to have interfered with the rights of a third party. The fact that the Act limits the basis for denial of consent to a franchise transfer does not mean that a common-law cause of action must exist for the benefit of a person who lacks standing to enforce any statutory right. . . . [I]t can hardly be suggested that statutory rights adopted for the benefit of a franchisee can be the basis for a common-law suit on behalf of someone not protected by the Act.
>
> The statute provides a remedy to a specific class of protected persons, existing "franchisees," and only to that class. The fact that others are unmentioned strongly suggests that the Legislature did not intend to grant them protection with respect to their prospective or contract interests in a franchise.

Id. at 1033 (citations omitted). Given the policy underlying the FPA, the court could "find no basis to authorize, as a matter of judge-made law, a tort remedy for the benefit of a prospective franchisee who is not protected by the Act itself." *Id.* at 1034 (citation omitted); *see also Horn v. Mazda Motor of America, Inc.*, 625 A.2d 548, 552 n.2 (N.J. Super. Ct. App. Div.) (citing *Tynan*, 591 A.2d at 1033) ("Any common law causes of action were preempted by the Franchise Practices Act."), *certif. denied*, 634 A.2d 528 (N.J. 1993).

The Court finds that *Tynan* controls and dictates the dismissal of Counts Seven through Ten of plaintiff's Complaint. Plaintiff, as a would-be purchaser of the two Toyota franchises, does not have standing to sue under the FPA. *See Tynan*, 591 A.2d at 1031. Because the Act was designed to protect ongoing franchise relationships, the franchiser owes a duty to give material reasons for a transferee's rejection only to the existing franchisee. Hagen, the existing franchisee in this case, chose not to litigate defendants' rejection of Shansab, and instead transferred the franchise to a third party. Even if, as plaintiff alleges, defendants' reasons for rejecting him were pretextual, plaintiff does not have standing to assert a claim under the FPA. The reasons behind defendants' rejection of plaintiff as transferee are simply not relevant to the issue of standing under the Act.[6]

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6 In addition, the injury alleged by plaintiff is not the type of injury that motivated the Legislature to enact the FPA. Shansab claims that because he was "wrongly denied the opportunity to take over the Gateway and Hampton franchises, the has lost the prospective business advantage and profit which he would other-

Plaintiff argues that standing was conferred upon him by virtue of defendants' failure to respond to his application within 60 days. Even if Shansab's application were "deemed granted" by defendants' untimely response, however, Shansab was not hereby transformed into a franchisee. As the New Jersey courts have recognized,

> The statute makes a distinction between a franchiser's determining that proposed transferees are *acceptable* as franchisees and its *accepting* them in that capacity. According to the N.J.S.A. 56:10-6, no transfer, assignment or sale of a franchise "shall be valid unless the transferee agrees in writing to comply with all the requirements of the franchise then in effect." A duly executed parts settlement accounts memo, floor plan agreement, and assets purchase agreement may very well be reasonable requirements of a franchise agreement between an automobile manufacturer or distributor and one of its dealers. If so, a franchiser could reasonably refuse to execute a franchise agreement with its new dealer until those documents were submitted, whether or not they affected the prospective dealer's *acceptability.*

Horn, 625 A.2d at 554-55. Even if defendants' untimely response rendered plaintiff an acceptable transferee, plaintiff

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wise have gained from these going concerns and the successor dealerships Shansab would have operated." (Compl. ¶ 59.) This is simply not the type of harm that the FPA was designed to prevent. *See Tynan*, 591 A.2d at 1030.

was never accepted in the capacity of franchisee. The Court therefore rejects plaintiff's argument that a franchiser's untimely decision can convert a prospective transferee into a franchisee with standing under the Act.[7] Accordingly, the Court shall grant the motion of defendants TMS, TMD, and TMCC to dismiss plaintiff's claims under the FPA.

Finally, Shansab argues that "standing under the Franchise Practices Act is *irrelevant* to plaintiff's standing to bring an interference claim." (Pl.'s Opp'n Br. At 14.) Plaintiff's argument simply cannot be reconciled with the law of New Jersey. In *Tynan*, the court rejected the argument that the common-law tort of interference with prospective economic advantage survived the FPA. *Tynan*, 591 A.2d at 1033; *see also Horn*, 625 A.2d at 552 n.2. Accordingly, the Court shall grant the motion of defendants TMS, TMD, and TMCC to dismiss Shansab's claims for tortuous interference with prospective economic advantage.

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7 Further, plaintiff's own Complaint makes clear that neither franchise was ever transferred to Shansab. Plaintiff avers that "in the summer of 1993, . . . EMCO became the Gateway Toyota franchise transferee." (Compl. ¶ 45.) Similarly, according to the Complaint, "the Hampton franchise was awarded to parties other than Shansab." (*Id.* ¶ 58.)

III. MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT BY DEFENDANT TMCC

In support of its motion to dismiss the Complaint, defendant TMCC argues that "[n]one of the ten Counts of plaintiff's Complaint is directed at TMCC or identifies any alleged wrongs by TMCC." (Def. TMCC's Br. at 5.) TMCC contends that it does not make decisions as to the acceptability of dealer candidates. (*Id.*) Rather, TMCC asserts, its function is to provide "financial services to authorized Toyota dealers and their retail customers." (*Id.*) Alternatively, TMCC argues that if the Court does not dismiss the Complaint as against TMCC, plaintiff should be required to submit a more definite statement of its claims against TMCC. (*Id.* at 11.)

Shansab responds that TMCC played a "discernable role in the common scheme" and that the allegations of the Complaint, when taken as a whole, state a claim against TMCC. (Pl.'s Opp'n Br. at 27.) Plaintiff contends that "a failure to particularly distinguish the part played by any one defendant in a wrongful course of conduct made the subject of a complaint is not grounds for a more definite statement." (*Id.* at 26.)

A. Motion to Dismiss

The Court finds that the allegations of Shansab's Complaint, when viewed as a whole, state a claim against defendant TMCC. Although the Complaint frequently fails to differentiate among the corporate defendants, the Court cannot conclude, at this stage of the litigation, that plaintiff can

prove no set of facts which would entitle him to relief against TMCC. *See Conley*, 355 U.S. at 45-46. TMCC argues that "Shansab has had over two years since the allegedly wrongful conduct to investigate the legal and factual basis for his claims, and, presumably having done so, does not identify any wrongful conduct by TMCC." (Def. TMCC's Br. at 6.) Plaintiff, however, has not yet had the benefit of discovery. Mindful that the issue on a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims," *see Scheuer*, 416 U.S. at 236, the Court shall deny TMCC's motion to dismiss the Complaint in its entirety.

B. Motion for a More Definite Statement

The starting point for determining whether plaintiff has met his pleading requirement is Federal Rule of Civil Procedure 8(a). Rule 8(a) provided that "[a] pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). In describing the limited burden that the pleader must satisfy under Rule 8(a), the Supreme Court stated that

> the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts on which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47-48.

A motion for a more definite statement will be granted only "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." FED. R. CIV. P. 12 (e). A motion for a more definite statement is "generally disfavored, and is used to provide a remedy for a unintelligible pleading rather than as a correction for a lack of detail." *Frazier v. Southeastern Pennsylvania Transp. Auth.*, 868 F. Supp. 757, 763 (E.D. Pa. 1994) (citation omitted). "Whether to grant a motion for a more definite statement is a matter within the discretion of the trial court." *Delta Educ., Inc. v. Langlois*, 719 F. Supp. 42, 61 (D.N.H. 1989) (quotation omitted).

The Court concludes that Shansab's Complaint meets the liberal pleading standard set forth in the Federal Rules of Civil Procedure. The Complaint provides TMCC with notice as to the nature and basis of plaintiff's claim. The information TMCC seeks is obtainable through discovery. *See Frazier*, 868 F. Supp. At 763. Accordingly, because the Complaint adequately sets forth the basis of plaintiff's claim, the Court shall deny TMCC's motion for a more definite statement.

IT IS, therefore, on the 18th day of September, 1996, ORDERED that the motion to dismiss Counts Seven, Eight, Nine, and Ten of plaintiff's Complaint by defendants Toyota Motor Sales, U.S.A., Inc., Toyota Motor Distributor, Inc., and Toyota Motor Credit Corporation be and is hereby GRANTED;

IT IS FURTHER ORDERED that the motion to dismiss the Complaint in its entirety or, in the alternative, for a more

definite statement by defendant Toyota Motor Credit Corporation be and hereby is DENIED.

s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge